No. 20107

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD, Debtor in possession

APPELLANT

vs.

FRANCES K. ARNOLD

APPELLEE

APPELLANT'S CLOSING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT for the
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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APPELLANT, pro se

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ARGUMENT

I

FAUD IS NOT AN ISSUE IN THIS PROCEEDING. In his Reply Brief, pellee's counsel resumes his determined effort to mislead this Court, she succeeded in doing on the first appeal (No. 18854), by raising a se cry of "fraud". The Court will note, however, that the word does appear in the Referee's order of Nov. 10, 1964, denying confirmation rk's Transcript, pp. 31-34), which is being reviewed in this appeal. at is at issue here, as in the prior appeal, is not fraud but juris- ion in rem and the conflict over it between the Superior Court and Bankruptcy Court. It is true that the arguments of Appellee's couns p. 2, line 17, Reply Brief) invariably allege fraud, concealment, etc.; the Referee has made no such finding -- which, if made, would be fatal the Arrangement proceeding. (The 'fraud in procurement' for which tion 386(2), Bankruptcy Act, is invoked is a misnomer, representing fatal moral turpitude but merely remediable technical error. Non- closure of the Superior Court judgment in these proceedings would either fatal fraud, if the judgment transferred the property to Appellee, an immaterial irrelevancy if it accomplished no transfer of title.) ellant, knowing the judgment to be void as to property under settled ifornia law, made no disclosure of it, yet committed no fraud.)

II

OUTLAWED DEBTS ARE INVOLVED IN THIS PROCEEDING. Since Reply Brief persists in referring to debts "obviously outlawed under laws of the State of California"(line 3, p. 2) --an erroneous view ived at by ignoring Section 312, Code of Civil Procedure and starting

running of the Statute of Limitations when a note is executed, not when matures -- it is here noted again that the Referee's order offers no nclusion on this absurd question of law. There were no outlawed debts.

III

CRECY AND CONCEALMENT ARE NO BAR TO CONFIRMATION.

is entirely lawful for a husband to file an original petition under the nkruptcy Act without the knowledge and consent of his wife. Appellee's orce action was filed similarly, and also lawfully. (In reality, she rw of the Arrangement proceedings a few days after they were begun; re was no secrecy.) A wife is in privity with her husband; he repre- nts both, and she is not a necessary party but may intervene to pro- t her interests if she can show fraud.

Secondo v. Sup. Ct. (1930) 105 Cal. App. 179

Cutting v. Bryan (1929) 206 Cal. 254

e husband must bring all actions regarding the community property.

Sanderson v. Nieman (1941) 17 Cal. 2nd 563

this proceeding, the wife has indeed intervened -- not by showing any d against herself, but for the purpose of committing fraud against legitimate creditors of the marital community by misusing divorce to negate the Federal Bankruptcy Act.

Panton v. Lee, quoted on p. 24, Opening Brief

should be remarked that this whole proceeding, whose purpose is to vert Appellant's promissory notes into notes secured by a Deed of st, had its origin in Appellee's concealment of her divorce plans her consequent refusal to encumber community property which she ned to take free and clear of creditors' claims. She cannot be heard complain of 'secrecy and concealment', in a court of equity.

SUPERIOR COURT JURISDICTION WAS NOT OUSTED, BUT ABSENT.

The Reply Brief persists in the untrue statements that Appellant contends that the Bankruptcy Court ousted the Superior Court from jurisdiction over the community property (line 22, p. 1), and that Superior Court jurisdiction (in rem, presumably) attached on filing of the divorce action (note 6, p. 3). Appellant contends, however, that (1) Filing of a personal action for divorce does not constitute the legal seizure necessary for jurisdiction in rem, (2) the Superior Court took no other steps to seize or control the property, such as appointment of a receiver, prior to judgment, and (3) if the Superior Court had taken such jurisdiction, it would have been ousted by the Bankruptcy Court on filing of the debtor's original petition, which invokes the paramount and exclusive jurisdiction in rem under the Bankruptcy Act. The Reply Brief cites no authority for the presumption that a State court takes an inviolable jurisdiction in rem over community property when a divorce action is filed, and none can be cited. The Supreme Court of California has consistently ruled otherwise.

> Wife's contention: "The fact that the suit for divorce was pending placed all the common property in custody of the law. . the wife would have been entitled at the termination of that action to such a share of the common property owned when the suit was brought as the Court might then have determined to be proper."
>
> The Court's opinion: "The pendency of proceedings for a divorce does not, of itself, interrupt the exercise of the husband's powers. The property does not come into the custody of the Court by the institution of the suit. The husband has still the control of it and full power of disposition of it."
>
> Lord v. Hough (1872) 43 Cal. 581

anges in the laws of divorce since 1872 have not affected this ruling.

"When a divorce is pending the power of a husband over the community property exists until the entry of a final decree.(Lord v. Hough . . Chance v. Kobsted . . In re Cummings. . ."

Harrold v. Harrold (1954) 43 Cal. 2nd 77 at 81

ppellant does not deny the potential jurisdiction in rem given the court y Section 140, Civil Code (pp.3,4 : Reply Brief); the Superior Court may ke orders controlling community property BUT in the case at bar it not --- until after the Bankruptcy Court had seized the property and s made impossible the making of lawful Superior Court orders in rem e was no ousting of jurisdiction, no snatching of the res by another rt, when the Arrangement petition was filed; the conflict came later, en the Superior Court rendered judgments determining title and possion of property already in custody of the Bankruptcy Court, and used contempt power to enforce its void orders.

The case at bar is just the reverse of that in Town of Agawam v. nners, where the State court seized property in a lien foreclosure, er the Bankruptcy Court had relinquished its jurisdiction following a nfirmation of arrangement and could not regain it. Lien foreclosure like divorce) is the recognized exception to the rule of paramount nkruptcy-court jurisdiction in rem (Opening Brief, p. 11). The case is in point, and the language quoted is not found in 330 U.S. 845 (the emorandum decision denying certiorari).

"Where state court's jurisdiction in rem has attached first, bankruptcy court has no power to interfere, though Congress could have conferred exclusive jurisdiction even in such cases."

Town of Agawam v. Conners (1947) 159 Fed. 2nd 360 (CA, 1st)

'res snatching' occurred in that case, and should not occur in this one.

PARAMOUNT JURISDICTION CANNOT BE LOST BY ABSTENTION.

The paramount and exclusive jurisdiction in rem conferred by the Bankruptcy Act cannot be lost through acts of bankruptcy officers: trustee, receiver, referee, or district judge. This Court has said:

> "Congress has provided for the administration of bankrupt's estate in the bankruptcy court; and after a bankruptcy has supervened, no other court has the power or authority partially to administer or to deplete the estate, by disposing of or impressing a lien upon it or upon any part thereof --valid prior liens, of course, excepted-- not even in favor of its own receivers."

Moore v. Scott (1932) 55 Fed. 2nd 863 (CA, 9th)

The bankruptcy court cannot surrender its control of the debtor's estate,

Hanna v. Brictson Mfg. Co. (1932) 62 Fed. 2nd 139 (CA, 8th)

nor can its officers lose control by laches, waiver, or estoppel.

C.R.I.P.Ry. Co. v. Owatonna (1941) 120 Fed. 2nd 226 (CA, 8th)

The bankruptcy court may not completely abnegate its jurisdiction,

Natl. Bank v. Council (1950) 339 Ill.App. 585, 91 NE 2nd 66

but may not abstain from assumption of it, although it has discretion to refuse to exercise its authority in every instance a case affords.

Beach v. Rome Trust Co. (1959) 269 Fed. 2nd 367 (CA, 2nd)

The Federal court must take jurisdiction and decide difficult or uncertain questions of State law, not abandon the case to State courts.

Meredith v. Winter Haven (1943) 320 U.S. 228

However, the jurisdiction is exclusive only over the debtor and his property, and just so far as required for appropriate control.

Natl. Tool Co. v. Goldie (1939) 27 Fed. Supp. 399 (DC, Minn.)

In re Diversey Bldg. Corp. (1936) 86 Fed. 2nd 456 (CA, 7th)

NIAL OF A DISCRETIONARY STAY DOES NOT ABANDON JURISDICTION.

e Reply Brief (pages 2, 7) places much weight on the Referee's denial a stay of the Superior Court orders involving the community property, l contends that for lack of such stay Appellant is now estopped from stioning the void judgments now in effect. However, paramount jurisdic- is not that easily lost. The Referee erred in declining jurisdiction rem over property in the debtor's possession on filing his petition,

Sampsell v. Papenhausen (1948) 79 Fed. Supp. 45 (DC, Cal.)

the Superior Court cannot lawfully seize District Court property.

Nuckolls v. Bk. of Calif. (1937) 10 Cal. 2nd 266, 114 ALR 708

stay of action in another court is proper unless the right thereto is clea l unequivocal; in a doubtful case, comity requires denial.

Vermont Slate Co. v. Tatko Co. (1956) 147 Fed. Supp.860 (DC,N.Y.)

wever, such denial is merely an incident in the exercise of jurisdiction, a final and complete disclaimer of such jurisdiction.

> "A federal court does not impugn its jurisdiction when in the exercise thereof it denies a discretionary writ, such as the extraordinary writ of injunction, especially when a federal equity court withholds its discretionary writ because of . . perplexities that arose. . . and when a discretion afforded by equity jurisprudence is exercised as a matter of comity, so as to avoid friction in state and federal relations under our dual form of state and national governments."

Sun Oil Co. v. Burford (1942) 130 Fed. 2nd 10 (CA, 5th)

e Referee in the case at bar, uncertain of his court's jurisdiction, ied a stay of the Superior Court order evicting the debtor; Appellee d the District Court of Appeal) now seek to nullify that jurisdiction the ground it was not exercised, but such argument is frivolous.

is not true as alleged (Reply Brief, p. 2, lines 10, 13) that the Bankptcy Court did not take possession of the community real property. ppellant, as Debtor in Possession acting as trustee for the Court, did ld possession from June 19, 1962, when his original debtor's petition is filed, to March 20, 1963, when he was jailed by void orders of the perior Court; the Referee, of course, took no possession personally.

It is untrue that Appellant made no attempt to prevent interrence by the Superior Court with the Bankruptcy Court's possession of e res (Reply Brief, p. 2, line 12; p. 7, line 7). When it became apparent at the Superior Court contemplated illegal seizure of the property by varding immediate possession (as well as ultimate title) to Appellee, ppellant filed written objections on Oct. 15, 1962, pleading the arrangeent with creditors in bar to such award. On Oct. 22, 1962, he made rther oral objection to the jurisdiction in rem of the Superior Court, a hearing on re-opening the case for further testimony, but Judge roninger replied "I am not going to pay any attention to the proceedgs in the Federal court", and signed the Interlocutory Judgment.

When Superior Court proceedings to evict Appellant from s debtor's estate began, he filed on Feb. 13, 1963, and urged orally at e Feb. 15 hearing the objection that the Superior Court lacked jurisdicon in rem necessary to issuance of a quasi in rem exclusion order, ut the order was nevertheless made by Judge Bostick on Feb. 15. The feree denied on Feb. 21, 1963, a stay of the exclusion order, as did istrict Judge Weigel on Feb. 28. A petition for a writ of prohibition as denied by the District Court of Appeal on March 18, 1963. At the ntempt hearing of March 20, 1963, Appellant again raised the question f jurisdiction in rem, but was sentenced to 25 days in jail. The Superr Court has had several opportunities 'to pass upon its jurisdiction'.

AY OF THE DIVORCE PROCEEDINGS WAS UNWARRANTED. The Reply ef suggests (p. 7, lines 7, 12, 15) that the divorce proceedings should ve been stayed, either by the Superior Court or by the Bankruptcy urt, and that Appellant was remiss in not securing such a stay. He ask both courts to stay interference with the res in custody of the kruptcy Court, without success, and also urged the jurisdictional lack briefs and petitions to this Court, the District Court of Appeal, the reme Court of California, and the Supreme Court of the United States. o to no avail. Interference with the res should be stayed,

Bain v. Montana Power Co. (1936) 84 Fed. 2nd 126 (CA, 9th)

Bryant v. A.C.L.Ry.Co.(1937) 92 Fed. 2nd 569 (CA, 2nd)

Barnett v. Mayes (1930) 43 Fed. 2nd 521 (CA, 10th)

the discretionary stay should be denied by the Bankruptcy Court if other suit does not encroach on its exclusive jurisdiction in rem.

Foust v. Munson Lines (1936) 299 U.S. 77

tay by the State court is also discretionary.

Connell v. Walker (1933) 291 U.S. 1

personam suits, not involving the debtor's estate, cannot be stayed all, but may proceed to judgment.

Gutenschn v. K.C.S. Ry. Co. (1944) 140 Fed. 2nd 950 (CA, 8th)

". . the Trustee is not bound . . by the prior state court proceedings. . merely because the (Debtor) was a party defendant in the prior litigation. Only in a limited situation will the Trustee be foreclosed. This will not include a mere in personam proceeding, for if . . the judgment was a personal one against the (Debtor), then it was not binding on the (Debtor's) estate, because the Trustee was not made a party defendant . . to be binding the prior pr-

ceeding must have been in rem or quasi in rem."

Coleman v. Alcock (1959) 272 Fed. 2nd 618 (CA, 5th)

vorce action, though sometimes said to be in rem as regards marital us, is not in rem as regards community property; it is in personam.

"The action was solely for the purpose of procuring a judgment of of divorce between the parties. . . The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and (determination of) their rights to the community property is but incidental thereto."

Kirschner v. Dietrich (1895) 110 Cal. 502

"It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental."

Dwyer v. Nolan (1905) 40 Wash. 459, 82 Pac. 746

legislation or court decision has recognized the avowedly mercenary ure of some divorce suits, so far as to make them in rem actions nst community assets in fraud of husband and creditors; the rule is the contrary, and all divorce suits are considered to be in personam.

Hannah v. Swift (1932) 61 Fed. 2nd 307 (CA, 9th)

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

is, in the case at bar, neither need nor authority existed to stay the orce action itself, but only to stay interference with the res arising n the Superior Court's enforcement of its void judgments, beginning n the eviction order of Feb. 15, 1963. Had the Referee granted a stay ll proceedings in rem against the community assets in the Superior rt, on filing of the debtor's petition June , 1962, that Court could ertheless have proceeded to a personal judgment in the divorce action.

:h judgment, of course, could not involve (but might affect -- see p. 22, ening Brief) the community assets, or nullify the rights of creditors.

"Complaint is made that it was an abuse of judicial discretion for the trial court to proceed to trial. . because the United States District Court for the Northern District of Texas had made and entered an order. . . restraining appellee . . from prosecuting any proceeding in any other court, for the purpose of fixing a lien or foreclosing upon, or taking possession of any property involved in the petition for review of the referee's order, pending in the United States District Court. We are of the opinion that the . . court. . as between appellant and appellee, had the unquestioned right to proceed to trial, as was done, regardless of the order of the United States District Court. We are of the opinion that it was not error for the . . court to enter judgment partitioning the community property, even though it was involved in the bankruptcy case, complaint likewise being made as to this action of the trial court."(emphasis added)

Turman v. Turman (1936) 99 SW 2nd 946 (Tex. Civ. App.)

is judgment is in accord with the principle that a Federal court may t enjoin State court proceedings in personam, but only those in rem.

Toucey v. N.Y. Life (1941) 314 U.S. 118 at 141, 137 ALR 967

nversely, State court actions in personam may proceed simultaneously th Federal Court actions in rem, without interference.

Kline v. Burke (1922) 260 U.S. 226, 24 ALR 1077

Mandeville v. Canterbury (1943) 318 U.S. 47

the Turman case, the Texas trial court respected the limits of its 'n jurisdiction, as imposed by the Bankruptcy Act; it did not seize the s, imprison the trustee, or defraud the creditors, but simply defined e personal rights of the parties in consequence of divorce.

E INTERLOCUTORY JUDGMENT COULD NOT TRANSFER TITLE.

e Superior Court had jurisdiction in personam, but not in rem over mmunity property. It could lawfully grant divorce and decree that the sband's rights in the property be given to the wife on dissolution of marriage by Final Decree. That Court had no jurisdiction, however, effect an immediate transfer of title and possession to the wife, in fiance of Federal law, or to ignore California law by refusing to con- er the debts of the husband and the rights of creditors in the comm- ty property. The Bankruptcy Court, moreover, acquiesced by inaction.

> ". . the (Federal) Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the State court. This, it has been steadily held, a Federal court may not do."
>
> McClellan v. Carland (1909) 217 U.S. 268 at 281

thholding the exercise of Federal court power is proper, up to a point, Federal abdication in deference to State usurpation must be avoided.

> "Finally, although there is no doubt that a judgment in the state court upon the issues there involved will be binding upon the parties. . .(and). . even if the power to proceed with this litigation is conceded to the state court, it may not, as an incident thereto, take action which will impinge upon the functions of the national tribunal under the laws relating to bankruptcies. The federal court now has paramount and exclusive jurisdiction of the proceeding. . . By allowing these issues to be tried in the state court, the bankruptcy tribunal has yielded no whit of its essential powers. The federal court has still full authority to perform the functions which are entrusted to it by Congress. Therefore, it was not error to

permit the state courts to proceed with the litigation there pending."

In re Terrace Lawn (1958) 256 Fed. 2nd 398 (CA, 9th)

his Court agrees, therefore, that the State court may determine the sues proper to a divorce action, and bind the parties by its judgment, cluding the adjudication of personal rights in property held in custodia gis by the bankruptcy court, but without controlling the property.

Genl. Exporting Co. Star Line (1943) 136 Fed. 2nd 329 (CA, 6th)

U.S. v. Klein (1938) 303 U.S. 276 at 281

endition of a declaratory judgment, ordering no action but simply deter- ining rights of the parties in the res, constitutes no interference with e jurisdiction in rem of the bankruptcy court. Specifically, a declaratory dgment against the trustee does not interfere with the debtor and his operty, over which the Federal court's jurisdiction is exclusive.

Gutensohn v. K.C. Southern Ry. Co., supra

Commonwealth v. Bradford (1935) 297 U.S. 613

proper Interlocutory Judgment of Divorce is a declaratory judgment, lfining the personal rights of the litigants but ordering no action such transfer of title to community assets; it is tentative, and withholds cion pending a Final Judgment which may never eventuate.

In the divorce action Arnold v. Arnold, what was 'awarded' the wife was not the community property --that is, fee title, free of editors' claims-- but only the husband's rights in it (his half-interest, be added to hers, but both interests subject to community debts).

"The wife's interest in the community property could only become vested and severable upon a dissolution of the community and there was no dissolution. . . Until such dissolution, either by divorce or by the death of one spouse, the wife's interest was an inchoate one and not such as to form the basis for an action to quiet title."

Chance v. Kobsted (1924) 66 Cal. App. 434

that case, as in this one, the law was circumvented, and

". . plaintiff sought to enforce an indeterminate equitable interest against the property."

ere is no legal theory by which the 'award' of the Interlocutory Judg-nt can transfer title to community assets free of creditors' claims, or thing more than a tentative right to the husband's residual interest

"It would be a startling doctrine to hold that, on the death of the wife, one half of the common property immediately vested in the children of the marriage, without reference to the payment of the debts contracted by the husband for the benefit of the joint community. . .The common property should be and is, not one half but the whole, a security for the payment of debts contracted for the common benefit. . . and neither the heirs of the wife nor of the husband have any interest, except in the portion which shall remain after the payment of such debts."

Panaud v. Jones (1851) 1 Cal. 488 at 517

would be doubly startling if not one half but both halves vested in the e without benefit of either death or divorce to dissolve the community.

". . when the community is dissolved. . by a decree of divorce, the authority of the court to assign all the community property to one of the spouses must be taken and construed as meaning the residue of such property after the payment of the existing debts of the husband, contracted upon the faith of such property. . The community property to be distributed may well be considered (as in case of partnership, to which in many respects (marriage) bears a close resemblance) as the residue which remains after the discharge of the community obligations.

"Had the husband by a voluntary conveyance transferred all of the community property to his wife, leaving himself without means, it is not to be doubted but that the property so transferred would have been liable to his creditors for existing debts.

When the court assigned all the property to (creditor) it, in effect, did what in law the husband should have done under like circumstances, and the conclusion is reached that in such a case where all the community property has been assigned to the wife, leaving the husband without separate property, the property so assigned is taken subject to the equitable claim of . . creditors, whose demands are due. . on account of credit extended during the existence of the marital relation to the husband for the benefit of the community.

. . Under such circumstances every moral consideration prompts the satisfaction of the demand from the community property. And we are of opinion the moral and legal obligations go hand in hand."

Frankel v. Boyd (1895) 106 Cal. 608 at 614

award of assets without proper allowance for debts is an obvious lation of Section 389, Code of Civil Procedure, since the creditors indispensable parties to an action seeking to nullify their rights. e obligation to pay the debts is an inseparable accompaniment to the vilege of taking title to the assets, and cannot be escaped.

Bank of America v. Mantz (1935) 4 Cal. 2nd 322

Farmers' Exch. Natl. Bank v. Drew (1920) 48 Cal. App. 442

Hannah v. Swift (CA, 9th), supra; quoted, p.15, Opening Brief

Panton v. Lee (CA, 10th), supra; quoted, p. 24, Opening Brief

e Interlocutory Judgment could not transfer title, free of creditors' claim.

TE DISTRICT COURT OF APPEAL DECISION WAS A REVERSAL.

Ie Reply Brief objects (p.8) to the alleged 'misstatement of fact' that
: immediate transfer of title purportedly contained in the Interlocutory
Igment's 'award' was 'reversed by modification' (Opening Brief, p. 20).
t is true that the Interlocutory Judgment 'as so modified' was affirmed,
: it is also true that the modification was an effective reversal of the
parent transfer of title on which the Referee bases his withholding of
nfirmation. It is irrelevant to this appeal that the provisions granting
iorce, alimony, child custody and support, and even possession of the
mmunity real property, were affirmed. The Referee's concern arises
m the fact that the Interlocutory Judgment of Oct. 22, 1962, preceded
confirmation of Arrangement granted on Oct. 30, 1962. If the Judgment
ected a valid immediate transfer of title from Appellant to Appellee,
Bankruptcy Court lost its principal asset from the debtor's estate,
king impossible the proposed Arrangement. If, however, the transfer
title was either invalid or not immediate, the Arrangement could be
nfirmed. By holding that the property disposal provisions shall be
ective only on entry of a final decree of divorce, the District Court
Appeal nullified the Superior Court's attempt at an immediate transfer
title and removed the obstacle to confirmation of the Arrangement.
is portion of the decision (quoted in pertinent part on pp. 18, 19, 20,
ening Brief) is based entirely on California law, without reference to
her jurisdiction in rem or the Bankruptcy Act, but is correct.

The portion of the decision affirming the Superior Court
der of Feb. 15, 1963, excluding Appellant from his debtor's estate, is
orrect, rejecting on frivolous grounds the paramount and exclusive
isdiction in rem of the bankruptcy court and suggesting that the Super-

r Court had taken previously the necessary jurisdiction in rem and uld not be divested of it by the proceedings in bankruptcy court. The clusion order, made under Section 157, Code of Civil Procedure, is quasi in rem order necessitating jurisdiction in rem.

"An action is in rem where relief demanded requires control of the res, even though seeking also to establish personal liability."

U.S. v. Bank of N.Y. Trust Co. (1936) 296 U.S. 463

e jurisdiction in personam held by the trial judge was insufficient to pport the exclusion order, which sought to control the property.

"Where the judgment sought is strictly in personam. . for an injunction compelling or restraining action by the defendant both a state court and a federal court. . .may proceed with the litigation. . .But if the two suits are in rem or quasi in rem, requiring that the court or its officer have control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessit yield to that of the other.. ."

Penn Genl. Casualty Co. v. Pa. (1935) 294 U.S. 189

risdictional law thus forbids both the transfer of title ('award' of the pperty) and eviction of the debtor from his estate, while divorce law rbids the transfer of title in fraud of creditors prior to Final Decree. he District Court of Appeal contention that the Superior Court had jurdiction in rem to transfer title and evict Appellant is incorrect and not mpatible with settled law establishing paramount jurisdiction in rem in e bankruptcy court. The Certificate of Nonpublication indicates that the urt was not aware that its decision "involves a new and important sue of law, a change in an established principle of law", disqualifying e decision for non-publication under Rule 976, Calif. Rules of Court.

HE PRINCIPLE OF RES JUDICATA DOES NOT BAR CONFIRMATION.

here is no place in this appeal for the application of the doctrine of s judicata, for several reasons:

(1) The judgment in the prior appeal (No. 18854) affirming the setting aside of the confirmation dealt with a Referee's order that was interlocutory, not final.

(2) The judgment was obtained by fraud upon this Court by counsel for Appellee, by misrepresenting the basis for the Referee's order.

(3) The causes of action in the two appeals are not the same, and the jurisdictional question has not yet been settled finally.

is well established that an interlocutory or provisional judgment, such the setting aside of a confirmation for remediable technical error der Section 386(2), Bankruptcy Act, is no bar to further action; to be ch bar, the first judgment must put an end to the case.

Am.Natl. Ins. Co. v. Yee Lim Shee (1939) 104 Fed. 2nd 688 (CA, 9th)

Holmes v. Donald (1936) 84 Fed. 2nd 188 (CA, 5th)

Kannel v. Kennedy (1937) 94 Fed. 2nd 487 (CA, 3rd)

Ryerson Inc. v. Bullard Co. (1935) 79 Fed. 2nd 192 (CA, 2nd)

Pillsbury v. Sup. Ct. (1937) 8 Cal. 2nd 469

Greenfield v. Mather (1939) 14 Cal. 2nd 228

hat this Court's opinion in the first appeal (No. 18854)

Arnold v. Arnold (1964) 326 Fed. 2nd 960 (CA, 9th)

ads like a final judgment is due entirely to fraud by Appellee's coun-l in misrepresenting to this Court the basis for the Referee's order:

". .the basic question to be decided was not whether the. . Interlocutory Judgment. . was a valid transfer of title . . but one of fraud and concealment . . by listing outlawed . . debts. . and . . concealing the

bankruptcy proceedings from his wife. . "

Appellee's Reply Brief, No. 18854, p. 3. Filed Nov. 20, 1963

owever, in an order served on Appellant June 21, 1963, denying a mand-ory injunction to Appellee to conserve the debtor's estate, her counsel ide the conflicting and incompatible statement that

". . said real property. . was heretofore awarded to FRANCES KELLY ARNOLD . . . in the Superior Court . . and objection being made by counsel . . to the jurisdiction of this Court. ."

Order in Case No. 68024, U.S. District Court

e Referee's order on appeal (pp. 32, 33, Clerk's Transcript) makes it ar that the question at issue, then as now, was not fraud but validity the Interlocutory Judgment as a transfer of title; or, alternatively ted, whether the District Court lacked jurisdiction in rem -- as was ccessfully contended by Appellee's counsel at the hearing of June 20, 1963, d denied with equal success in his Reply Brief 5 months later.

A judgment obtained by fraud cannot be pleaded as res judicata.

Seubert v. Seubert (1941) 68 S.D. 195, 299 NW 873

Rubinsky v. Kosh (1929) 296 Pa. 285, 145 A 836

be effective in bar, a judgment must be definitive, deciding all points issue between the parties --such as jurisdiction in rem in this appeal.

Price v. Town of Ruston (1933) 148 So. 512 (La. App.)

so, identity of subject-matter in the two appeals is required; they must olve the same cause of action. This appeal is concerned with confirm-on of an Arrangement, the first appeal with correction of remediable hnical error in procurement through a temporary setting-aside of a firmation granted before the jurisdictional issue was raised.

Walrath v. Roberts (1928) 23 Fed. 2nd 32 (CA, 9th)

e first appeal arose from the non-disclosure of the Interlocutory Judg-

ent and its purported transfer of title and concomitant loss of District ourt jurisdiction in rem; the merits of the Arrangement were not at sue, supposedly, except in curing the 'fraud in procurement', under ction 386(2), Bankruptcy Act, such error being presumed remediable. this appeal, the Interlocutory Judgment having been disclosed, the erits of the Arrangement come up for consideration; the Referee finds e Interlocutory Judgment valid, barring confirmation, while Appellant ntends there was no transfer of title (both because it was untimely by ate divorce law and because the Superior Court lacked jurisdiction in rem e Interlocutory Judgment having been reversed in part by the District urt of Appeal for the first of these reasons) and confirmation is not rred. That part of the District Court of Appeal decision affirming the id Superior Court exclusion order is itself void, and cannot properly pleaded in bar of confirmation under the res judicata doctrine.

Chambers v. Hodges ( ) 23 Tex. 104

Pioneer Land Co. v. Maddux (1895) 109 Cal. 633

XI

ARE DECISIS, NOT RES JUDICATA, IS THE APPLICABLE DOCTRINE.

ere is no case in the appellate records where a California divorce urt has given the assets of the marital community to the wife, the ts to the husband, and nothing to the creditors--except Arnold v. Arnold! ere is no case where the Federal courts have decided a contest for assets between a wife and a bankruptcy trustee in favor of the wife except Arnold v. Arnold! The District Court of Appeal decision -- the y original appellate holding on the question of jurisdiction in rem -- void on that point; it has no foundation in prior court decisions, but llifies without justification the long-settled principle that the jurisdiction

n rem of the Federal courts of bankruptcy is paramount and exclusive, ot subject to surrender by court or debtor, and incapable of being seiz-d by other courts.

The wife's consent is unnecessary to validate a deed if the usband holds the property as a trustee, not in his own right.

Anderson v. Broadwell (1931) 119 Cal. App. 130

he mention of Section 172a, Civil Code, in the decision of this Court n the prior appeal was dictum, and need not be regarded as 'law of he case'. Error and injustice are correctible by a second appeal.

Davis v. Davis (1938) 96 Fed. 2nd 512 (CA, D.C.)

Lebold v. Inland Steel Co. (1943) 136 Fed. 2nd 876 (CA, 7th)

Southern Ry. Co. v. Clift (1922) 260 U.S. 316 at 319

ankruptcy courts, unlike others, may grant a rehearing at any time, ermitting a new appeal to be taken on an undetermined issue.

Wayne United Gas Co. v. Owens-Ill. Glass Co.(1937) 300 U.S. 131

Bowman v. Lopereno (1940) 311 U.S. 262 (reversing CA, 9th)

he District Judge's affirmation of the Referee's order denying confirm-tion for lack of jurisdiction in rem should be reversed by this Court, o permit the impression of an equitable lien on the parties' community eal property and thus guarantee payment of the valid debts incurred by ppellant for the benefit of the community.

RESPECTFULLY SUBMITTED,

ated: November 17, 1965.

J. Howard Arnold
Appellant, pro se

No. 20107

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD, Debtor in Possession

APPELLANT

VS.

FRANCES K. ARNOLD

APPELLEE

APPELLANT'S OPENING BRIEF

Appeal from the

UNITED STATES DISTRICT COURT for the
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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JURISDICTIONAL BASIS

This appeal is taken from a final judgment made and entered in e United States District Court for the Northern District of California, uthern Division, and is prosecuted in accordance with the provisions Rule 72 et seq. of the Federal Rules of Civil Procedure. Jurisdiction this Court is based on Title 11, United States Code, Section 47. Jurdiction of the District Court is based on Title 11, U.S. Code, Sections , 711, and 712.

On June 19, 1962, Appellant J. Howard Arnold filed in the U.S. strict Court, San Francisco, an original Petition for an Arrangement th Creditors under Chapter XII, Title 11, U.S. Code. On Sept. 25, 1962 e proceeding was transferred to Chapter XI by amendment.

On October 30, 1962, the Referee, the Honorable Bernard J rott, made and entered an order confirming an Arrangement under apter XI. On February 28, 1963, on petition of debtor's wife, Appellee ances F. Arnold, Referee Abrott made and entered an Order Setting ide Confirmation of Arrangement, under Section 386(2) of the Bankptcy Act. This order was affirmed on appeal by this Court on Januy 24, 1964, and rehearing denied on Feb. 27, 1964.

On June 29, 1964, Appellant herein filed an Amended Plan Arrangement, confirmation of which was denied by the Referee in an der filed Nov. 10, 1964. On Feb. 17, 1965, after hearing, a District dge, the Honorable Alfonso J. Zirpoli, made and entered a Decision firming Order of Referee. On March 1, 1965, Appellant moved to er and amend judgment and findings under Rules 52b and 59e, Federal les of Civil Procedure. On March 17, 1965, after hearing and consideration, Judge Zirpoli filed an order denying the motion to alter and amend tice of Appeal was filed on April 14, 1965.

STATEMENT OF THE CASE

Basicly, this case involves a conflict of jurisdiction in rem between a State divorce court and a Federal court of bankruptcy, with Superior Court usurping power unlawfully in an attempt to transfer title to community assets to Appellee in fraud of creditors, and a U.S. District Court abstaining from assumption and exercise of its paramount and exclusive jurisdiction in rem under the Bankruptcy Act, for reasons of unwarranted comity and perplexity.

The Referee declines to use the term 'jurisdiction in rem', referring to consider the validity of the Superior Court judgment, and concludes that the "award" (i.e., immediate transfer of title) of community real property to Appellee in a divorce action was valid and bars District Court confirmation of an Arrangement involving said property. The award was reversed on appeal to the District Court of Appeal as an improper attempt to transfer title, but the State courts still claim jurisdiction in rem. Pertinent law is clear, but findings, conclusions, and decisions in this and related cases are unclear, garbled, missing, or simply erroneous.

Appellee Frances K. Arnold filed her suit for divorce on November 29, 1961, in Superior Court, Alameda County. She made the customary claim of 'extreme mental cruelty' as ground, and asked that all the principal community assets (including the real property which is the subject of the Arrangement herein) be given to her, with custody of 4 minor children. The Superior Court permitted her to use community funds for counsel fees, but denied that right to Appellant, forcing him to trial without counsel; the denial was affirmed on appeal. Appellee is mentally ill and incompetent to sue; she has been in menopause since Sept. 1960, and since April 1961 has been addicted to excessive amounts of amphetamine pep-pills (the psychotoxic drug Dexedrine). Nevertheless

in interlocutory judgment of divorce was granted on Oct. 22, 1962, "awarding" her the community real property and other assets. The Superior Court on Feb. 15, 1963, ordered Appellant out of the family home and on March 20, 1963, enforced its order by contempt proceedings.

The District Court of Appeal on Feb. 14, 1964, affirmed the interlocutory decree of divorce and the eviction order, insisted that the Superior Court had jurisdiction in rem, but reversed the "award" of community assets as an immediate transfer of title and limited its becoming effective to a possible future entry of a Final Decree of Divorce, as required by California law. (The Final Decree obtained ex parte on April 21, 1964, is being appealed as fraudulent, having been obtained through a false affidavit while the Interlocutory Decree was not finally determined, certiorari ultimately being denied by the U.S. Supreme Court on Oct. 12, 1964.)

On June 19, 1962 (after filing of the divorce action but prior to judgment therein), Appellant J. Howard Arnold filed an original petition for an Arrangement with Creditors under the Bankruptcy Act, listing the family home in his Schedule B-1 as 'community property of petitioner and his wife', stating that no declaration of homestead had been filed, and not claiming it as exempt. The Arrangement plan proposed a second Deed of Trust on this real property in the amount of $14,750, the affected creditors being Appellant's mother and brother. Pendency of the irrelevant divorce action was not disclosed to the Court.

On Oct. 30, 1962 -- a week after entry of the Interlocutory Judgment "awarding" the community real property to Appellee-- the Referee properly confirmed the Arrangement with Creditors. Later, after learning of the prior judgment affecting the same real property, the Referee on Appellee's petition set aside the confirmation on Feb.

8, 1963, under Section 366(2) of the Bankruptcy Act. Unfortunately, the teferee's order (written for his signature by Appellee's counsel) did ot make clear that his action was based on the supposed validity of the uperior Court judgment (and resulting loss of jurisdiction in rem by he District Court). The appeal was further complicated by the denial, n Appellee's Reply Brief, that jurisdiction was at issue, and by the bsence of adequate explicit findings of fact. This Court refused to ule on the question of jurisdiction in rem and validity of the State ourt judgment, but affirmed the setting-aside order on other grounds, peculatively but erroneously supplying the missing findings of fact, nd thereby rendering the first appeal futile. In July, 1963, Appellant earned from the Referee that the jurisdictional question was foremost, nd urged in his briefs that it be decided; but this Court refused.

On June 29, 1964, Appellant submitted an Amended Plan of rrangement, and requested confirmation of it. On Nov. 10, 1964, the eferee denied confirmation, and on Feb. 17, 1965, District Judge Zirpoli ffirmed the order on review. Appellant then moved to alter andamend he findings, conclusions, and judgment, for the sake of clarity as well s to correct error, but the motion was denied on March 17, 1965, nd this appeal followed.

The present appeal seeks to reverse the Referee's denial of onfirmation by showing that, under established law,

(1) The Superior Court did not take jurisdiction in rem over the community property on filing of the divorce action Nov. 29, 1961.

(2) The U.S. District Court did take jurisdiction in rem over the community property on filing of the Arrangement petition on June 19, 1962, which jurisdiction is paramount and exclusive, cannot be divested by the Superior Court, but can displace the Superior Court.

(3) The Interlocutory Judgment of Oct. 22, 1962, was void as to transfer of title and possession of community property, then in custody of the U.S. District Court, since the Superior Court lacked jurisdiction in rem and could not assume it lawfully by seizure.
(4) Immediate transfer of title to community property, attempted by the Superior Court, was held improper and reversed on appeal; California law permits only a tentative, hypothetical "award" for the Court's later guidance in rendering a Final Decree of Divorce.
(5) California law does not permit award of community assets to the wife and community debts to the husband in a divorce judgment, but vests in the wife on Final Decree only the residue (assets less debts); a judgment disposing of assets without consideration of debts is void as in fraud of creditors, and cannot quiet title in the wife against the world, but only against the husband.
(6) The void property disposal provision of the Interlocutory Judgment was no bar to confirmation of the Arrangement on Oct. 30, 1962; the Referee should not have set it aside, and for the same reason should not have denied confirmation on Nov. 10, 1964.
(7) No bar to confirmation was established by the previous appeal in this case, the reliance of this Court on Section 172a, Civil Code, having been induced by an erroneous conception of the Referee's findings, which are now clarified in the new order denying confirmation solely because of the Interlocutory Judgment's supposed validity.
(8) No Final Judgment of divorce can vest the real property in Appellee, as the Superior Court lacks jurisdiction in rem, despite the District Court's abstention; the Final Judgment of April 21, 1964, is wholly void for lack of jurisdiction of the subject-matter, ante-

dating final determination of the Interlocutory Judgment by denial of certiorari by the U.S. Supreme Court on Oct. 12, 1964.

SPECIFICATION OF ERRORS

(1) The Referee erred in his Finding of Fact (IV) (Clerk's Transcript p. 32, line 13) that the immediate award of the real property to the Appellee was affirmed on appeal; the award was in fact modified so as to reverse it as improper, and postpone it to Final Decree.

(2) The Referee erred in his Conclusion of Law (I) (Clerk's Transcript p. 33, line 16) that the Interlocutory Judgment, in its property award provisions, "was valid and bars the involvement of said property in the arrangement"; the award was void ab initio for lack of jurisdiction of the subject-matter, void when recorded for lack of jurisdiction in rem, and reversed by the District Court of Appeal Feb. 14, 1964.

(3) The Referee erred in his Conclusion of Law (II) that Appellant has "no right, title or interest in and to said real property"; as Debtor in possession acting as trustee for the U.S. District Court, which holds the property in custodia legis, he has held the legal title to said property since filing his original petition on June 19, 1962.

(4) The Referee erred in his Conclusion of Law (III) (Clerk's Trans. p. 33, line 26) that ". . confirmation . . is barred by the decision of the Court of Appeals" in the prior appeal involving the setting aside of a confirmation; the invoking of Section 172a, Civil Code, in that decision arose from an incorrect concept of the Referee's findings, which have now been corrected and amplified to make clear that only the validity of the Superior Court judgment is in question, and no fraud is charged. or debts ruled not allowable.

(5) The District Judge erred in refusing to make an independent deter-

nination of the questions of fact and law and merely adopting the findings and conclusions of the Referee, and in refusing to clarify the ague and uncertain language of the Referee's order in holding that the rior decision of this Court required conformity to Section 172a, Civil Code.

SUMMARY OF ARGUMENT

The Referee denied confirmation of the proposed Arrangement ecause he presumed an Interlocutory Judgment of divorce "awarding" he real property involved to Appellee effected a valid immediate transer of title to her. The Interlocutory Judgment was not valid, but void or lack of jurisdiction in rem, which the Superior Court has never eld, but which the U.S. District took on filing of Appellant's original etition under the Bankruptcy Act. The attempted transfer of title was nproper, and was reversed on appeal. California law does not permit ward of community assets to a wife without allowance for community ebts; only the residue (assets less debts) vests in the wife on entry f a valid Final Judgment of divorce, and then only if the Superior ourt can take the necessary jurisdiction in rem.

This Court's decision in a prior appeal of the setting-aside a previous plan of Arrangement after confirmation held that a wife's onsent was necessary to confirmation, under Section 172a, Civil Code, because the effect of it is to encumber community real property on a oluntary petition by the husband. That decision was based on an erroneus concept of the Referee's findings and avoided a determination of te basic question of conflict of jurisdiction in rem between State and Federal courts. The prior decision is dictum, does not determine the law of the case; it is wholly irrelevant to the present appeal, and oes not bar confirmation; State law does not supersede Federal law.

ARGUMENT

art A: The Interlocutory Judgment of Divorce does not bar confirmation.

I

. Superior Court does not take jurisdiction in rem over ommunity property on filing of a divorce action.

n some types of suit, where control of the res is essential to the asic decision (e.g., mortgage foreclosures), filing of the suit is sufficint to accomplish a legal seizure and give the court jurisdiction in em. In a divorce suit, however, disposal of the community property s unessential to deciding the main issue of divorce, and jurisdiction n rem is not taken until entry of judgment, the property remaining nder the management and control of the husband.

In re Cummings (1949) 84 Fed. Supp. 65 (DC, Cal.)

Chance v. Kobsted (1934) 66 Cal. App. 434

Lord v. Hough (1872) 43 Cal. 581

hese three cases are customarily quoted in decisions of the Supreme ourt of California as decisive on this point of jurisdiction in rem.

Harrold v. Harrold (1954) 43 Cal. 2nd 77

Vai v. Bank of America (1961) 56 Cal. 2nd 329

rom the filing of the divorce action on Nov. 29, 1961, to rendition of jdgment on Oct. 22, the Superior Court took no jurisdiction in rem by eizure of the community property, and made no attempt to do so. hen the attempt was made by recording of judgment on Oct. 23, 1962, i was too late: the property had been seized on July 19, 1962, by the U.S. Istrict Court, exercising its paramount and indivestible right under te Bankruptcy Act to take jurisdiction in rem for the benefit of creditors, on Appellant's petition.

U.S. District Court takes jurisdiction in rem by legal seizure of a ebtor's property, including community assets, on filing of his original etition under the Bankruptcy Act. That jurisdiction is exclusive.

is well settled that the filing of a debtor's petition initiating pro-eedings under the Bankruptcy Act constitutes legal seizure of the ebtor's property. The property seized includes community property if ie debtor is a husband, but not if the debtor is a wife (who holds) ownership interest, reachable by creditors through judicial process, ut only a protected expectancy, an heirship).

Grolemund v. Cafferata (1941) 17 Cal. 2nd 679

Taylor v. Sternberg (1934) 293 U.S. 470

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the (debtor) and a settlement and distribution of his estate. This jurusdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of of the petition. . . It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the District Court having acquired the exclusive right to administer all property in the (debtor's) possession. . . . "

Straton v. New (1931) 283 U.S. 318

risdiction in rem is inherently exclusive; it cannot be concurrent, to held and exercised jointly by State and Federal courts contemplat-n different disposals of the res. Obviously, when a Superior Court eks to give community assets to a divorcing wife in fraud of creditors, il a U.S. District Court acts for the creditors, a conflict arises.

III

Jurisdiction in rem can be held by only one court at a time; in case of conflict, the Bankruptcy Act gives the U.S. District Court paramount and exclusive jurisdiction.

In the Superior Court case of Arnold v. Arnold, that Court has never taken jurisdiction in rem over the community property. Had it made a legal seizure of the property early in the divorce action, it would have displaced by the U.S. District Court when the original petition for an Arrangement was filed, as its bankruptcy jurisdiction is paramount.

In re Jacobs (1934) 7 Fed. Supp. 749 (DC, Ill.)

Taylor v. Sternberg (1934) 293 U.S. 470

"The fact that the jurisdiction of the (Federal) court is paramount effectually distinguished that class of cases which hold that as between courts of concurrent jurisdiction property already in the hands of a receiver of one of them cannot rightfully be taken from him without that court's consent by a receiver subsequently appointed by the other court. . . the jurisdiction of the (federal) court is paramount and not concurrent. . . the power of the state court . necessarily came to an end with the supervening bankruptcy."

Gross v. Irving Trust Co. (1933) 289 U.S. 342

Jurisdiction in rem is acquired by the court making the first seizure, not the court in which an action is first filed.

Averill v. The Steamer Hartford (1852) 2 Cal. 308

Harkin v. Brundage (1928) 276 U.S. 36

Leggett v. Green (1951) 188 Fed. 2nd 817 (CA, 8th)

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

In general, however, any other court first seizing the property must later relinquish it to the bankruptcy court, without regard to comity.

". . . its being prior in time cuts no figure. The priority of right in the bankruptcy court. . . must prevail . . without regard to the rules of comity, for as respects this matter the courts are not of concurrent jurisdiction."

In re Moore (1930) 42 Fed. 2nd 475 (DC, Ga.)

"There is no question of that comity arising between courts of concurrent jurisdiction in this case . . Under the Constitution the jurisdiction of a court of bankruptcy in administering the estates of (debtors) under the provisions of the Bankruptcy Act is complete and exclusive, and it is not only the right, but the duty, of such courts to draw unto themselves all the property of the . . . estate and the determination of all claims and demands existing. . "

First Savings Bank v. Butler (1932) 282 Fed. 866

he only recognized exception to the paramount jurisdiction in rem of ıe bankruptcy court occurs when the suit in the other court has the ırpose of enforcing a pre-existing lien, as in a foreclosure.

"A state court has exclusive jurisdiction of the res only to the extent the liens thereon are valid as against the trustee in bankruptcy. . . state court action, to the extent it may have attempted to deal in rem with the property, abated upon the filing of the petition."

Engelbrecht v. Wildman (1959) 263 Fed. 2nd 133 (CA, 9th)

"The test that determines jurisdiction is . . whether there exists a debt, no matter how arising, which may be enforced against the (debtor) or the (debtor's) estate. . .The debtor having by his petition placed his property within the jurisdiction of the (Federal) Court, . . all subsequent proceedings in the State Court, including the writ by which he was dispossessed, are a nullity . . ."

Walker v. Detwiler (1940) 110 Fed. 2nd 164 (CA, 6th)

In re Hardman (1960) 189 Fed. Supp. 804 (DC, Ind.)

Divorce cases do not fall within this category of exceptions to the rule of paramount jurisdiction in rem of the bankruptcy court, as the wife has no prior lien on the property.

Panton v. Lee, supra; quoted infra, p. 24

Community property is open to seizure by the bankruptcy court at any time during the pendency of a divorce action, prior to judgment in the divorce court.

IV

After Federal bankruptcy court seizure, judgments taken against property in another court are null and void for lack of jurisdiction in rem, and no new judgment liens may attach to the property.

After the filing of an original petition under the Bankruptcy Act, the U.S. District Court holds paramount and exclusive jurisdiction over the property of the debtor, until the proceeding is finally terminated. No other court, State or Federal, can legally interfere with District Cour possession and control of the property during this period of time.

> "Upon filing a petition under Chapter XII, all of the property of the Debtor is brought within the jurisdiction of the . .Court, which jurisdiction is paramount and exclusive, and thereafter no action taken in any other court can affect the proceedings in the (Federal) Court. Since the judgment of the State court. . . is the sole foundation for claimant('s) . . claim, the judgment being void, the claim is void and, likewise, the whole decree of the State court."

In re Potts (1944) 142 Fed. 2nd 883 (DC, Ark.)

"Upon such filing, the jurisdiction of the Court becomes paramount

and exclusive; and thereafter that Court's possession and control cannot be affected by proceedings in other courts, whether State or Federal."

Taylor v. Sternberg (1934) 293 U.S. 470

White v. Schloerb (1900) 178 U.S. 542

Any act by a State court interfering with Federal court custody is void, whether contested or not, without formal sanction by the Federal court and assent by the debtor.

In re Calif. Pea Products (1941) 37 Fed. Supp. 658

Kalb v. Feuerstein (1940) 308 U.S. 433

"The defendant below set up a proceeding in a Federal court as a protection against further prosecution in the state court. . Thereby the defendant claimed the benefit of a Federal right. . Should the state court have declined to exercise its jurisdiction when the pending proceeding was. . . set up in denial of the right to entertain further proceedings in the state tribunal? . . It is . .certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the (debtor's) estate from the jurisdiction of the bankruptcy court. . . '''

Acme Harvester v. Beekman Co. (1911) 222 U.S. 300

The property disposal provisions of the Interlocutory Judgment of Oct. 2, 1962, and of the Final Judgment of April 21, 1964 (which is also void for fraud) in the Superior Court are thus null and void for lack of jurisdiction in rem, which has never been taken in that case by the Superior Court and was no longer available to it after District Court seizure of Appellant's property on June 19, 1962, when his original petition was filed.

Straton v. New (1931) 283 U.S. 318

Wabash R.R. v. Adelbert College (1908) 208 U.S. 38

Jurisdiction in rem, once taken, may not be relinquished by a court of bankruptcy over the protest of the debtor; the court may not abstain from assumption and exercise of its paramount and exclusive jurisdiction.

The U.S. District Court may not lawfully turn over its jurisdiction in rem to a State divorce court, but must exercise and defend it.

". . the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts. . . . . Creditors are entitled to have this authority exercised. . the court. . was not at liberty to surrender its exclusive control. . . "

U.S. Fidelity Guar. v. Bray (1912) 225 U.S. 305

The District Court may not abstain from exercise of its jurisdiction or procedural reasons, except in very unusual circumstances which are not present in the case at bar.

Mach-Tronics v. Zirpoli (1963) 316 Fed. 2nd 820 (CA, 9th)

County of Allegheny v. Mashuda Co. (1958) 360 U.S. 185

The paramount and exclusive jurisdiction in rem of the Federal court cannot be lost through illegal invasion of it by a State court,

McClelland v. Carland (1909) 217 U.S. 268

Ex parte Baldwin (1934) 291 U.S. 610

Irving Trust Co. v. Fleming (1934) 73 Fed. 2nd 423 (CA, 4th)

or through adverse seizure of the res by a State court,

Bank of Calif. v. McBride (1943) 132 Fed. 2nd 769 (CA, 9th)

May v. Henderson (1934) 368 U.S. 111 (reverses CA, 9th)

but remains with the court of bankruptcy, despite that court's efforts to divest itself of its power and the State court's determined efforts to usurp the untended jurisdiction with complete disregard of justice and law.

A divorce judgment purporting to award community assets to the wife, in fraud of creditors, and community debts to the husband, is contrary to California law, and void.

"Community property", as the term is used in the divorce laws,

Section 146, Civil Code of California

does not refer to assets, but to the residue left after allowance is made for the unsecured and secured debts of the husband (which, in California, are community debts for which community property is liable).

Packard v. Arellanes (1961) 17 Cal. 525

Bank of America v. Mantz (1935) 4 Cal. 2nd 322

Grolemund v. Cafferata (1941) 17 Cal. 2nd 679

Earlier, this Court decided against another California wife who sought to take community assets without paying creditors' claims against the marital community, and in that decision this Court followed established law:

> "(Her) contention seems to be that as a member of the marital community she is entitled to the possession of the entire community property and the community debts must go unpaid, save and except such indebtedness as is secured by mortgage or other encumbrance executed by the husband and wife. . .It would seem to be a sufficient answer to (her) contention to call attention to the fact that the Supreme Court of California, as early as 1861, ... held that the term 'community property' as used in the statutes of California as between husband and wife and the creditors meant a residuum of the property . . after the payment of the community debts. . the courts of California have decided that the community property . . . is subject to community debts. . It follows that the

trustee in bankruptcy . . is entitled to the possession of community property for the benefit of creditors. . . "

Hannah v. Swift (1932) 61 Fed. 2nd 307 (CA, 9th)

The decision has been twice reaffirmed during the past two years.

Martolf v. Elliott (1963) 326 Fed. 2nd 204 (CA, 9th)

Sulmeyer v. Pfohlman (1964) 329 Fed. 2nd 915 (CA, 9th)

There is no adequate reason for not following the Hannah decision in the case at bar, in which Federal courts have permitted illegal seizure and disposal of Appellant's debtor's estate by an aggressive and ruthless divorce court acting in open defiance of State and Federal law.

A divorce action between two spouses is inherently incapable of nullifying the rights of creditors unjoined as defendants, but can only determine the rights of the parties by a judgment in personam. The divorce court cannot legally award community assets to a wife free and clear of creditors' claims.

Panton v. Lee, supra; quoted infra, p. 24

"This divorce action is not an in rem action to quiet title against the world; it is a disposition of property as between the spouses incident to the dissolution of the marital relation."

McClenny v. Sup. Ct. (1964) 62 Adv. Cal. 140 at 147

In the divorce action between the parties to the case at bar, the trial judge not only failed to consider the debts (which were prominently at issue in the trial), but refused to recognize the paramount jurisdiction in rem of the District Court over the assets which he sought to transfer immediately to Appellee by Interlocutory Judgment. Without all creditors joined as defendants, or any provision for meeting their claims against the marital community, the Superior Court had no power to dispose of community assets free and clear of creditors' claims.

roperty disposal provisions in an Interlocutory Judg-
ient of divorce are preliminary and tentative, taking
ffect only if and when the marriage is dissolved by
inal Judgment of Divorce, and subject to revision.

n Interlocutory Judgment is merely a tentative finding at the time of
ial to serve as a guide later in making the property disposal in the
inal Judgment of Divorce. It is a judgment in personam, requiring no
risdiction in rem over the community assets for its rendition.

"In sum, the interlocutory decree is merely a determination that after the lapse of a year the parties would, if no impediments have airsen, be entitled to a decree dissolving the marital relation and disposing of the community property in the manner described in the interlocutory decree. Its provisions are not operative until the entry of the final decree."

Estate of Boeson (1927) 201 Cal. 36

the Arnold v. Arnold divorce action, (1) debts were not considered
creditors joined as defendants, hence the determination of Appellee's
ghts to community assets by the trial judge was void; (2) already an
superable impediment to the property disposal had arisen in the form
Appellant's invoking of exclusive District Court jurisdiction in rem
his petition for an Arrangement with Creditors; and, finally, (3) the
ial judge's attempt at immediate transfer of title to community asset
om husband to wife had no sanction in law, and was reversed on
peal as "improper"-- lacking jurisdiction of the subject-matter.
ntrary to the Referee's finding of fact, the Interlocutory Judgment
s not affirmed as to property, on appeal, but effectively reversed by being

"The interlocutory decree, however, makes a present disposition of the community property. It is now settled that such an award is improper and, where made, should be modified by the appellate court so as to provide that the provisions disposing of the community property of the parties shall be effective upon the entry of the final decree of divorce. (Brown v. Brown (1960) 177 Cal. App. 2nd 387). . . For the reasons above stated, the trial court is directed to modify the interlocutory decree of divorce to provide that the provisions disposing of the parties community property shall be effective upon the entry of the final decree of divorce; the interlocutory decree, as so modified, is affirmed; . . ."

Arnold v. Arnold, Cal. App. Feb. 14, 1964 (unpublished) under Rule 976, Calif. Rules of Court) 1 Civil 2 1272

Thus, while the judgment was largely affirmed on appeal, the property-disposal provision of interest in the case at bar was modified to make it ineffective until Final Judgment, thereby reversing its intent as an immediate transfer of title.

It is legally proper for the trial judge in a divorce suit to decree that whatever community property the husband may possess at the subsequent time of Final Decree shall then go to the wife --- IF no impediments have arisen in the meantime and IF the 'community property' is properly distinguished from 'community assets'. Such a judgment makes no attempt to possess or control the assets, or to transfer title immediately, or to nullify the rights of creditors; it would require no jurisdiction in rem for its validity, and offer no bar to confirmation of an Arrangement with Creditors involving community assets already held in custodia legis by the U.S. District Court.

VIII

The District Court of Appeal decision that the Superior Court held jurisdiction in rem over the community property after filing of Appellant's original petition under the Bankruptcy Act is erroneous, and should not be followed by this Court. Other decisions do not support it.

The only original appellate opinion on the question of jurisdiction in rem in this situation is the District Court of Appeal decision of Feb. 4, 1964, quoted above (p. 18) in part for its reversal of the property-disposal provisions of the Interlocutory Judgment, as premature. That quotation is preceded immediately by the following:

> "Appellant's final contention on appeal from the interlocutory decree of divorce is that the court lacked jurisdiction in rem to make an award of the community property by reason of Appellant's having commenced a proceeding in federal court to obtain a creditors' arrangement subsequent to the commencement of the divorce proceeding but prior to entry of the interlocutory decree. This argument is untenable. Appellant concedes that his petition for a creditors' arrangement was not filed in the federal district court until June 19, 1962, some six months after the filing of the divorce action. Pursuant to 11 U.S.C.A., section 714, a court having jurisdiction of such a petition may enjoin or stay proceedings pending in other courts. Appellant did not apply for any such stay, and, to the contrary, wilfully concealed from the federal court the fact that divorce proceedings were pending against him. Under such circumstances, the mere filing of the petition for a creditors' arrangement was not in itself sufficient to divest the trial court

court held that the mere pendency of proceedings in bankruptcy did not deprive the superior court of jurisdiction. (To the same effect, see Smith v. Ehlegar (1953) 236 P. 2nd 749, 753-754.)"

Arnold v. Arnold, Feb. 14, 1964, 1 Civil 21272 (unpublished) Paradoxically, the decision holds that the Superior Court could not properly make an immediately effective "award" (i.e., transfer of title) of the community property to Appellee, it nevertheless had the jurisdiction in rem to make such an "award" and on the strength of it later to evict Appellant from his debtor's estate and turn it over to Appellee. This contention is absurd, and finds no support whatever in prior court decisions, which uniformly uphold the paramount and exclusive jurisdiction in rem of courts of bankruptcy and recognize the filing of the original petition as an effective legal seizure of debtors' property. The difficulty lies in the meaning of the term "award", and in the differentiation between jurisdiction in rem and jurisdiction in personam.

The "award" which the trial judge attempted make, and which the appellate court reversed by modification, was a transfer of title, and an immediate one requiring the Superior Court to hold jurisdiction in rem at the time of judgment, in order to control title and possession of the res; but such an "award" is not authorized by law as part of an Interlocutory Judgment of divorce. The "award" which the law permits, and which resulted from the appellate "modification" of the judgment in rem, is a personal judgment, requiring for its rendition only a jurisdiction in personam, and offering no interference with the proceedings in U.S. District Court and no threat to the rights of creditors; it states merely that, on Final Decree, the wife shall be given 100% of the residual community assets, after all debts are paid.

The legal "award" is tentative and dormant until Final Decree; then its implementation requires an evaluation of creditors' claims against the marital community, and their payment. Such claims may be evaluated in Superior Court, either by joining the creditors as defendants or by negotiating out-of-court payments with them; or by a separate legal proceeding such as that in U.S. District Court under the Bankruptcy Act, which Appellant elected to initiate. The Superior Court attempt to give the community assets to the wife and the debts to the husband finds no sanction in the law.

The Brazil v. Azevedo decision on which the District Court of Appeal based its nullification of the paramount and exclusive bankruptcy jurisdiction in rem of the U.S. District Court hardly suffices for so momentous a reversal of long-established law. It involved no res, no jurisdiction in rem, but only a personal suit for money against defendant Azevedo; the bankruptcy proceedings were not his own, but his partners' and his firm's. The District Court of Appeal comments that, in Brazil v. Azevedo,

> ". . . the court held that the mere pendency of proceedings in bankruptcy did not deprive the superior court of jurisdiction."

The full quotation shows that jurisdiction in personam is meant:

> "The pendency of these proceedings in bankruptcy did not deprive the superior court of jurisdiction of this cause where the suit was stayed under Section 11a of the Bankruptcy Act."

"This cause" was a personal suit for money against a solvent defendant, not a contest with the bankruptcy court for control of a debtor's assets, in fraud of creditors and outside the law. The law is clear:

> "Where the judgment sought is strictly in personam, . . both a state court and a federal court may proceed with the litigation.

But if the two suits are in rem or quasi in rem . . requiring that the court . . . have control of the property which is the subject of one suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other."

Penn Genl. Casualty Co. v. Pa. (1935) 294 U.S. 189

"We have held that a court of bankruptcy has exclusive and non-delegable control over the administration of an estate in its possession. . . Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate. . . What it did give is exclusive jurisdiction of the debtor and its property . . .Any controversy involving that estate would have been within the exclusive jurisdiction of the bankruptcy court." (Emphasis added)

Callaway v. Benton (1948) 336 U.S. 132

The District Court of Appeal decision seeks to invalidate and circumvent established Federal law by postulating the assumptions that

(1) The Superior Court already held jurisdiction in rem at the time the original petition under the Bankruptcy Act was filed;

(2) "Mere filing" of the petition did not divest the Superior Court of that jurisdiction in rem in view of Federal court abstention;

(3) The circumstances of the case frustrate Federal jurisdiction, as

(a) The divorce was filed first, six months earlier that the Federal court petition for an Arrangement with Creditors;

(b) Appellant did not apply for a stay of Superior Court proceedings under 11 U.S. Code, Section 714;

(c) The pendency of the divorce action was not disclosed to the Referee.

All three of these assumptions are erroneous and without force.

(1) The Superior Court never took jurisdiction in rem by legal seizure; filing of a divorce action does not seize property;

(2) Filing of the Arrangement petition did not divest the Superior Court of jurisdiction in rem, because it had none; filing did invoke the paramount and exclusive jurisdiction in rem under the Bankruptcy Act, displacing all other courts if need be.

(3) The special circumstances of the case frustrate Federal jurisdiction only in rare instances, of which this is not one. Nothing that Appellant did, or failed to do, could in any way weaken or nullify the powers given the U.S. District Court by Congress, so as to permit the Superior Court to acquire and hold an indivestible jurisdiction in rem, even with acquiescence by the Federal courts.

(a) Bankruptcy court jurisdiction in rem is paramount and exclusive, not concurrent, and displaces that of other courts; priority in time is without advantage.

(b) No stay of proceedings was called for until the Superior Court attempted to seize the debtor's estate on Feb. 15, 1963, and did so on March 20. The Referee denied the stay on erroneous grounds of comity and perplexity, on Feb. 21, 1963. Shortly afterward, a District Judge also denied a stay, and the District Court of Appeal denied prohibition.

(c) Non-disclosure of the divorce action -- a personal suit between spouses, immaterial and irrelevant to the proceeding in rem between husband and creditors ---in no way impairs the jurisdiction in rem of the U.S. District Court, since the divorce court could not transfer title to the real property.

On the point of jurisdiction in rem, the reasoning of the District Court of Appeal decision is wholly erroneous, and fails to justify its conclusion. Its reliance on the single case of Brazil v. Azevedo adds nothing to the validity of its contentions, since that case is not in point and does not deal with jurisdiction in rem at all. A second case cited,

Smith v. Phlegar (1951) 73 Ariz. 11, 236 Pac. 2nd 749

is also not in point, as it involves a lien foreclosure in which, unlike a divorce suit, the State court necessarily takes jurisdiction in rem on filing of the action and does not yield it to the bankruptcy court. (See p. 11, This Brief).

IX

The Tenth Circuit decision in the case of Panton v. Lee correctly applies established jurisdictional law to the divorce-bankruptcy conflict; it should be followed here.

A precedent vastly superior to the District Court of Appeal decision in Arnold v. Arnold ---and one fully in accord with this Court's earlier opinion in Hannah v. Swift --- is afforded by an Oklahoma case decided in the Tenth Circuit,

Panton v. Lee (1958) 261Fed. 2nd 183 (CA, 10th)

where under circumstances similar to those in the case at bar the court ruled in favor of the creditors and against the divorcing wife who sought to nullify creditors' claims against community assets.

"In bankruptcy proceeding of husband where divorced wife asserted claim to the (debtor's) estate on basis of a divorce decree entered less than a month before filing of the voluntary petition . . . and divorce decree did not attach as a judgment lien under Oklahoma law. . . The divorce decree gave the wife judgment "for one-half of

ceded the bankruptcy the question arises as to whether the general language of the decree had the effect in the circumstances of establishing a right in the wife to one-half of the bankrupt estate unencumbered by creditors' claims. . . The trustee took the property of the (debtor) subject to liens then existing and valid under the Bankruptcy Act and the laws of the state where the property was situated. Under Oklahoma law the wife had no lien. Hence, her claim cannot prevail over the rights of the trustee . . .The referee further held that the property division contained in the divorce decree had the purpose of defeating and defrauding the creditors of the husband and amounted to a legal fraud. . ."

n each case, the divorce action was filed before the voluntary pro-eeding under the Bankruptcy Act. In each, the divorce decree did not ttach as a judgment lien: in Panton v. Lee, because of operation of Okla-oma law, and in Arnold v. Arnold because the Federal seizure preceded he interlocutory judgment of divorce. In neither case could a divorce ction be used to give assets to a wife ahead of creditors.

The Superior Court "award" in the case at bar remained, fter 'modification' on appeal, only what California law intended it to be: preliminary, tentative plan for disposal of residual community prop-rty (assets less debts) on Final Decree at some later time-- but with court, either State or Federal, protecting the rights of creditors. The terlocutory Judgment was not a judgment in rem removing community ssets from District Court custody, and could not bar confirmation of an rrangement a week later. Usurpation of jurisdiction by State courts and nwarranted abstention by Federal courts permit a divorcing wife to llify the rights of creditors, but only unlawfully.

Part B: This Court's prior decision does not bar confirmation.

X

Affirmation on appeal of the Referee's order setting aside confirmation of a previous Arrangement was erroneous, and rested on an incorrect speculative view of the case.

The decision of this Court in the prior appeal (No. 18854) of the Referee's order filed Feb. 28, 1963, setting aside the Arrangement confirmed Oct. 30, 1962, under Section 386(2), Bankruptcy Act on ground that

> ". . .fraud was practiced by the debtor . . . in procuring the confirmation of the Arrangement heretofore made herein, by concealing from this Court all facts of his marriage and divorce in the Superior Court . . ."

was unfortunately vitiated by the obscure language used by Appellee's counsel in preparing the order for the Referee's signature. First, the fact of his marriage was not concealed at all: the real property is listed in Schedule B-1 of the debtor's original petition as "community property of petitioner and his wife". Second, what is meant by "concealing from this Court all facts of his . . divorce" is that the existence of the void, immaterial, and irrelevant Interlocutory Judgment of Oct. 22, 1962, purporting to transfer title ("award") the real property to Appellee was not disclosed to the Referee prior to confirmation. What was at issue then, as now, was the validity of the "award", the right of the Superior Court to transfer title by Interlocutory Judgment, the question of conflict of jurisdiction in rem. The Referee's order did not make clear -- as does his recent order of Nov. 10, 1964, denying confirmation -- that the only point at issue was the validity of the Inter-

locutory Judgment of divorce as an immediate transfer of title to community property. Appellant, believing then as he does now that the Superior Court could not lawfully transfer title to property held in custodia legis by the U. S. District Court, did not disclose to the Referee the immaterial point that the Superior Court judgment had been rendered. There was no 'fraud in procurement' calling for the use of Section 386, but only a question of validity of the State court judgment; the law is clear, and the Referee should have declared the judgment void.

The situation was further complicated by Appellee's Reply Brief, which inferentially denied that there was any question of jurisdiction in rem and validity of the Interlocutory Judgment re property,

> "It was never contended at any time, or at all, in the bankruptcy proceedings that this property was exclusively the property of the wife, since it could not have become her property until the Interlocutory period developed into a Final Judgment of Divorce."(p.2)

However, Appellee's counsel had in fact objected to the jurisdiction of the District Court, and successfully, in opposing before the Referee the request of Appellant for an injunction against waste and damage to his debtor's estate, and well knew what was in the Referee's mind. The quoted statement from the Reply Brief (Nov. 15, 1963) concedes the lack of validity of the Interlocutory Judgment as a transfer of title.

This Court, misled by counsel's statements in the Reply Brief and the Referee's order, refused to consider the basic question of validity of the Superior Court judgment (or of jurisdiction in rem), and ought to explain the situation presented on appeal as follows:

(1) Appellee's counsel had alleged the scheduled debts were outlawed.

(2) The Referee found the debts were outlawed and not allowable, but neglected to make such a written finding.

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(1) Appellee's counsel had alleged the scheduled debts were outlawed.

(2) The Referee found the debts were outlawed and not allowable, but neglected to make such a written finding.

(3) The confirmed Arrangement involved a new encumbrance of real property by Appellant, equivalent to a gift to his creditors.

(4) Appellee's consent to such an encumbrance is required by Section 172a, Civil Code of California, on community real property.

(5) Without Appellee's consent, the Arrangement is invalid, having been procured by fraud against Appellee, and should be set aside.

This view of the Referee's action may now be refuted, as follows:

(1) The Reply Brief (p. 4) in the prior appeal asserts that debts incurred in the period 1951-58 were outlawed by 1962, citing the 4-year period in Section 337, Code of Civil Procedure, but overlooking Section 312 (which measures the 4-year period after the cause of action has accrued). As all attorneys know after a moment's reflection, a note outlaws 4 years after its date of maturity, not after its date of execution. Thus, a 10-year note executed in 1951 would outlaw in 1965, not 1955. All scheduled debts were allowable, not outlawed.

(2) The Referee has never found the debts to be outlawed and not allowable. Recently, in a proposed order lodged with the Referee Oct. 30, 1964 (Clerk's Transcript, p. 23, paragraph VI), Appellee's counsel once again attempted to secure a finding that the scheduled debts were outlawed, but the Referee did not include the proposed finding in his order of Nov. 10, 1964, denying confirmation (Clerk's Tr., p. 31-33).

(3) The proposed Arrangement is an encumbrance imposed on the community real property by the U.S. District Court for the benefit of creditors, not by a husband acting individually.

(4) Section 172a, Civil Code, does not apply to a Court trustee, even if

he is a debtor in possession dealing with his own property.

(5) Appellee's consent is not necessary for validity of the Arrangement. Consequently, the prior Arrangement should not have been set aside, and the order on appeal, denying confirmation, should not have been made. The question at issue in both appeals, that of jurisdiction in rem, has not yet been decided correctly.

XI

The scheduled debts were not outlawed, and no finding of the District Court holds them to be; if they were, the Arrangement would fall without use of Section 172a, Civil Code, and the proceeding would be dismissed.

The Referee's order denying confirmation quotes (Clerk's Tr. p. 33, l.2) a portion of this Court's opinion in the prior appeal, No. 18854:

> "Moreover, there was evidence which indicated that so-called "debts" might be barred by the statute of limitations. The plan arrangement provided for a second deed of trust on the community real property which was the home of the parties as security for appellant's "debts" to his brother and mother, thus converting unsecured debts into secured debts. The effect of this, since this is a voluntary petition on the part of appellant, is to place an encumbrance upon the community real property without the consent of the wife, which consent is required by Cal. Civ. Code Sec. 172a."

Yet, there was no evidence whatever indicating that any scheduled debts were outlawed, but only that certain unscheduled long-forgiven debts to Appellee's mother fell into this category. The debts involved in the Arrangement were not outlawed, and the Referee's order made no such finding in response to the absurd contention of Appellee's counsel that

ny note executed more than 4 years previously was outlawed. In the
bsence of evidence and findings, there should have been no retrial of
doubtful issue of fact by this Court, with substitution of its judgment
or that of the Referee and the District Judge.

Weiby v. Farmers Mutual (1960) 273 Fed. 2nd 327 (CA, 8th)

his Court has no power to make new findings of fact, even if the
ecessary evidence is available; in this case, the new finding was high-
speculative, wholly unsupported by any evidence, and directly opposed
the Referee's view. The case should have been remanded to the
istrict Court for explicit findings.

Smallfield v. Home Ins. Co. (1957) 244 Fed. 2nd 337 (CA, 9th)

Irish v. United States (1955) 225 Fed. 2nd 3 (CA, 9th)

Deering-Milliken v. Modern-Aire (1950) 231 Fed. 2nd 623(CA,9th)

n effect, the case previously appealed has now been remanded, and
ne Referee has refused to find the scheduled debts outlawed, but again
nds the confirmation barred by the Superior Court judgment. Also, it
hould be noted that the question of outlawed debts is immaterial here
ince a debtor may waive the Statute of Limitations at his option, even
ver objections by his wife.

Cunha v. Cunha (1935) 8 Cal. App. 2nd 413, 48 Pac. 2nd 130

Both Referee and District Judge now hold that the prior
ecision of this Court bars confirmation of a new plan by requiring
nformity to Section 172a, Civil Code, thus permitting Appellee to
gate the rights of creditors by withholding her consent. However, the
introduction of Section 172a into the case is dictum, unnecessary to
the decision as made on the hypothesis that the debts were outlawed,
nd applicable only if that hypothesis were correct. Outlawed debts, not
allowable, would require the dismissal of the entire proceeding, not

toward a confirmed Arrangement. after elimination of some minor 'fraud in procurement'. Either debts not allowable or a wife's consent not forthcoming would be incurably fatal to all possible Arrangements; both are not needed in the same hypothesis.

XII

Section 172a, Civil Code, is not properly a part of the law of this case, and cannot be invoked to bar an Arrangement by requiring the consent of a debtor's wife to encumbrance of real property by District Court order.

If the debts are outlawed, Section 172a is superfluous, as the proceeding can be dismissed for lack of creditors. If the debts are not outlawed, Section 172a is irrelevant, as State law cannot supersede Federal law to permit a wife to withhold community property from creditors in a proceeding under the Bankruptcy Act.

> "...once the property is in the hands of the court, private rights as respect that res are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by Congress. Conditions precedent to enjoyment of the benefits of the Bankruptcy Act . . cannot be provided except by Congress."
>
> Case v. L.A. Lumber Co. (1939) 308 U.S. 106

Concerning a Texas law forbidding the husband to incur debts or dispose of community real property during the pendency of a divorce suit --a statute much more stringent than Section 172a --- an opinion adopted by the Supreme Court of Texas says:

> "This statute cannot be given the effect of denying to a party to

a divorce suit the right to file a voluntary petition in bankruptcy.

The Constitution of the United States vests in Congress the power to enact national bankruptcy laws. It has exercised that power and the laws on that subject are supreme. . . The right of creditors cannot be defeated by agreements between husband and wife."

Hornsby v. Hornsby (1936) 127 Tex. 474, 93 SW 2nd 379

This Court has rejected the use of Section 172a and a similar Washington statute to enable a wife to take community assets in fraud of creditors.

Hannah v. Swift, supra

Gibbons v. Goldsmith (1915) 222 Fed. 826 (CA, 9th)

The Supreme Court of California has also limited the use of Section 172a to circumscribe its misuse by wives against creditors.

". . .the wife is represented by the husband in suits by or against him involving the community property, and this, too, notwithstanding the provision of Section 172a of the Civil Code requiring her signature to a transfer of such property, and notwithstanding the further fact that a judgment in such an action may have the practical effect of a conveyance."

Cutting v. Bryan (1929) 206 Cal. 254, 274 Pac. 326

". . . it may be inferred that the legislature intended that the husband . . . should retain the power to divest the spouses of their community property by his own act. . .so long as he does not make a gift of the community property without consideration. . .."

Grolemund v. Cafferata (1941) 17 Cal. 2nd 679, 111 Pac. 2nd 641

Union Mutual Life Ins. Co. v. Broderick (1925) 196 Cal. 497

Section 172a does not apply to an Arrangement proceeding, which is the telescoped equivalent of suit, seizure, judgment, execution sale, and reconveyance under encumbrance of the community real property.

Myers v. Motley (1943) 318 U.S. 623

Thygesen v. Neufelder (1894) 9 Wash. 455, 37 Pac. 673

In re Pekin Plow Co. (1901) 112 Fed. 306 (CA , 8th)

Whether the original petition was voluntary or involuntary does not matter, as the proceedings thereafter are the same, as are the rights of creditors against the community property.

In re Clinton (1930) 41 Fed. 2nd 749 (DC, Calif.)

In re Fraizer (1902) 117 Fed. 746 (DC, Mo.)

In sum, there is no lawful basis for incorporating Section 172a, Civil Code, into proceedings under the Bankruptcy Act, either to protect her from her husband's acts or to enable her to frustrate his legitimate negotiations with his creditors to her unfair advantage.

XIII

Affirmation on appeal of the application of Section 386(2), Bankruptcy Act, not only does not bar confirmation of an amended plan of arrangement, but serves only to correct technical errors and clear the way for confirmation of a new plan; it is not a terminal step.

The prior appeal, concerned solely with the setting-aside of the first confirmation, cannot result in a decision which bars every future confirmation by a dictum based on a mistaken view of the Referee's reasoning. Such an impasse violates the basic philosophy on which Section 386 rests --- in fact, makes it an absurdity in application because every subsequent arrangement must be denied confirmation for the same reason the first one was set aside. Section 386 is remedial, not punitive. The Referee, for reasons of comity and perplexity, has made the safe assumption that the Superior Court judgment in rem is valid, and looks to this Court for a clarifying decision, as does the District Judge.

In the prior appeal, this Court refused to consider the validity of the Superior Court judgment, which is now before the Court again, this time clearly stated, but complicated by the dictum of Section 172a.

Section 386 is remedial, not punitive, and does not serve to terminate a proceeding, but to renew it. The 'fraud in procurement' that it deals with is not irremediable or fatal to the proceeding. The Referee shows by his use of Section 386 that he meant the proceeding to go ahead if the obstacle of the Superior Court judgment could be overcome. (A quiet-title suit to test the validity of the judgments of State and Federal courts would have been preferable, since there was no remediable 'fraud in procurement' at issue but only the question of jurisdiction in rem.) Now that the false cries of "Fraud!!!" have abated, and the Referee's view of the matter is not obscured by extraneous and irrelevant diversionary arguments, a new decision from this Court, properly resolving the divorce-bankruptcy conflict in this Ninth Circuit, is in order.

CONCLUSIONS

1. The Referee's Finding of Fact "That said Interlocutory Judgment and Decree of Divorce was affirmed on appeal in the District Court of Appeal of the State of California" is clearly erroneous, the sole provision material to this case -- the attempted immediate transfer of title to Appellee, contrary to law -- having been effectively reversed, not affirmed; in the words of the decision, ". . the trial court is directed to modify the interlocutory decree of divorce to provide that the provisions disposing of the parties' community property shall be effective upon the entry of the final decree of divorce. . .'

2. The Referee's Conclusion of Law that "The judgment of the Superior

Court . . awarding the real property to Frances Kelly Arnold was valid and bars the involvement of said property in the arrangement. . " is erroneous, said judgment being invalid as a transfer of title for lack of jurisdiction in rem and valid only as a preliminary plan for implementation by Final Decree, and is a judgment in personam that cannot bar confirmation or nullify the rights of creditors unjoined as creditors in the divorce action.

3. The Referee's Conclusion of Law "That the debtor, J. Howard Arnold has no right title or interest in and to said property" is erroneous, since, as Debtor in Possession acting as trustee for the U.S. District Court he holds the legal title to the real property for the benefit of creditors, and has held it since seizure on June 19, 1962.

4. The Referee's Conclusion of Law "That confirmation of the proposed Amended Plan of Arrangement is barred by the decision of the Court of Appeals for the Ninth Circuit" is erroneous, said decision pertaining solely to the setting-aside of the previous confirmation and being based on a hypothetical and incorrect view of the Referee's view of the facts. The law of this case does not include Section 172a, Civil Code of California, and consent of a debtor's wife is not required in proceedings under the Bankruptcy Act.

. The Referee's order denying confirmation of the Amended Plan of Arrangement is erroneous, and should be reversed to grant confirmation.

CERTIFICATE

certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

Respectfully submitted,

ted: Sept. 22, 1965.

J. Howard Arnold

Appellant, pro se